IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ALTERNATIVE DISPUTE RESOLUTION POLICIES AND PROCEDURES

Revised 3/5/07

1. DEFINITIONS

1.1 "**Mediation**" refers to a nonadjudicative, third-party intervention wherein an impartial neutral, selected by the parties, facilitates negotiations between parties to help them reach a mutually acceptable agreement. The parties are responsible for negotiating a settlement. The neutral's role is to assist the process in ways acceptable to the disputants.

1.2 "**Early Neutral Evaluation**" refers to a nonadjudicative, third-party intervention by an impartial experienced attorney, selected by the parties, with subject matter expertise. After reviewing concise presentations of parties' claims, the neutral provides a non-binding evaluation of the case and thereafter is available to assist the parties in reaching an agreement.

1.3 "**Arbitration"** involves the referral of a dispute to an impartial third party (or a panel of three), selected by the parties, who, after giving the parties an opportunity to present evidence and arguments, renders a non-binding determination in settlement of the claim(s). Arbitration in the federal district court is further defined in 28 U.S.C. § 654. Parties may agree to be bound by the arbitrator's decision which is non appealable.

1.4 Other ADR Processes. See Section 7.

2. GENERAL PROVISIONS

2.1 **Staff and Responsibilities**. An ADR Coordinator will oversee the Court's ADR programs and shall have expertise in ADR procedures. The ADR Coordinator is responsible for designing, implementing, administering and evaluating the Court's ADR programs. These responsibilities include educating litigants, lawyers, Judges, and Court staff about the ADR program and rules. In addition, the ADR Coordinator shall be responsible for overseeing, screening and orienting neutral arbitrators, mediators and evaluators (hereinafter "neutrals") to serve in the Court's ADR programs.

2.2 **ADR Internet Site**. The ADR Unit's Internet site, located at http://www.pawd.uscourts.gov/pages/adr.htm, contains information about the Court's ADR processes, information about neutrals and their fees, answers to frequently asked questions, various forms approved by the Court, and information about becoming a neutral in the Court's programs.

2.3 **Contacting the ADR Coordinator**

The address, telephone and fax numbers, and e-mail address of the ADR Coordinator are:

ADR Coordinator
United States District Court
For the Western District of PA
700 Grant Street, Room 309
Pittsburgh, PA 15219
Telephone: (412) 208-7458
Fax: (412) 208-7512
E-Mail: PAWD_ADRCoordinator@pawd.uscourts.gov

The Court encourages litigants and counsel to consult the ADR Internet site and to contact the ADR Coordinator to discuss the suitability of ADR options for their cases or for assistance in tailoring an ADR process to a specific case.

2.4 **ADR JUDGE**

The Court has appointed the United States District Judge (who serves as the Chair of the Court's Standing Committee on Case Management and ADR) to serve as the ADR Judge. The ADR Judge is responsible for overseeing the ADR program, consulting with the ADR Coordinator on matters of policy, program design and evaluation, education, training and administration. When necessary, the Chief District Judge may appoint another Judicial Officer of this Court to perform, temporarily, the duties of the ADR Judge.

2.5 **NEUTRALS** Ad

A. Panel. The ADR Coordinator shall maintain a panel of neutrals serving in the Court's ADR programs. Neutrals will be selected from time to time by the Court from applications submitted by lawyers willing to serve or by other persons as set forth in section B(1)(b) below.

B. Qualifications and Training. Each person serving as a neutral in a Court ADR program shall be a member of the bar of this Court, a member of the faculty of an accredited law school, or be approved by this Court to serve as a neutral and be determined by the ADR Judge to be competent to perform the applicable duties, and shall successfully complete initial and periodic training as required by the Court and be a registered user of the Electronic Case Filing (ECF) system for the United States District Court, Western District of Pennsylvania. (All neutrals, including those who are retained privately, are required to be registered users of the Court's ECF system.) Additional minimum requirements for serving on the Court's panel of neutrals, which the Court may modify in individual circumstances for good cause, are as follows:

1. **Mediators.**

a. Attorney Mediators. Mediators who are attorneys shall have been admitted to the practice of law for at least 7 years and shall have:

i. substantial experience with civil litigation in federal court;

ii. completed 40 hours of mediation training, including training in the facilitative method of mediation. At least 16 hours of mediation training must be participating in simulated facilitative mediations;

iii. strong mediation process skills and the temperament and training to listen well, facilitate communication across party lines and assist the parties with settlement negotiations.

b. Non-attorney Mediators. Non-attorney mediators may be appointed to a case only with the consent of the parties. Mediators who are not attorneys may be selected to serve on the Court's panel of mediators if they are knowledgeable about civil litigation in federal courts and have:

i. appropriate professional credentials in another discipline;

ii. 40 hours of mediation training, including training in the facilitative method of mediation;

iii. experience mediating at least five cases; and

iv. strong mediation process skills and the temperment and training to listen well, facilitate communication across party lines and assist the parties with settlement negotiations.

2. Early Neutral Evaluators. Evaluators shall have been admitted to the practice of law for at least 15 years and shall have:

a. substantial experience with civil litigation in federal court;

b. substantial expertise in the subject matter of the cases assigned to them; and

c. the temperament and training to listen well, facilitate communication across party lines and, if called upon, assist the parties with settlement negotiations.

3. Arbitrators. Arbitrators shall have been admitted to the practice of law for at least 10 years and shall have:

a. For not less than five years, committed 50% or more of their

professional time to matters involving litigation; or

b. Substantial experience serving as a neutral in dispute resolution proceedings.

C. Immunities. All persons serving as neutrals in any of the Court's ADR programs are performing quasi-judicial functions and are entitled to the immunities and protections that the law accords to persons serving in such capacity.

2.6 EVALUATION OF ADR PROGRAMS

Congress has mandated that the Court's ADR programs be evaluated. Neutrals, counsel and parties shall promptly respond to any inquiries or questionnaires from persons authorized by the Court to evaluate the programs. Responses to such inquiries will be used for research and monitoring purposes only and the sources of specific information will not be disclosed to the assigned Judicial Officer in any report.

3. MEDIATION

3.1 DESCRIPTION

Mediation is a flexible, non-binding, confidential process in which a neutral person (the mediator), selected by the parties, facilitates settlement negotiations. The mediator improves communication across party lines, helps parties articulate their interests and understand those of their opponent, probes the strengths and weaknesses of each party's legal positions, identifies areas of agreement and helps generate options for a mutually agreeable resolution to the dispute. The mediator generally does not give an overall evaluation of the case. A hallmark of mediation is its capacity to expand traditional settlement discussion and broaden resolution options, often by exploring litigant needs and interests that may be formally independent of the legal issues in controversy.

3.2 ELIGIBLE CASES

Appropriate civil cases may be referred to mediation by order of the assigned Judicial Officer, following a stipulation by all parties, on motion by a party under LR 7.1, or on the Judicial Officer's initiative.

3.3 MEDIATORS

A. Appointment. After entry of an order referring a case to mediation, the parties

choose from the Court's panel a mediator who is available during the appropriate period and has no apparent conflict of interest.

B. Compensation. Unless otherwise agreed by all parties or ordered by the Court, one-half the cost of the mediator's services shall be borne by the plaintiff(s) and one-half by the defendant(s) at the rate contained in the neutral's fee schedule filed with the Court. In a case with third-party defendants, the cost shall be divided into three equal shares. A neutral shall not charge or accept in connection with a particular case a fee or thing of value from any source other than the parties. The Court may review the reasonableness of the fee and enter an Order modifying the fee. Compensation shall be paid directly to the neutral upon the conclusion of the ADR process, or as otherwise agreed to by the parties and the mediator. Failure to pay the neutral shall be brought to the Court's attention.

C. Fee Waiver. A party who demonstrates a financial inability to pay all or part of that party's *pro rata* share of the neutral's fee may request the Court to appoint a mediator who has agreed to serve *pro bono*. The Court may waive all or part of that party's share of the fee. Other parties to the case who are able to pay the fee shall bear their *pro rata* portions of the fee.

3.4 TIMING AND SCHEDULING THE MEDIATION

A. Scheduling by Mediator. Promptly after being chosen to mediate a case, the mediator shall, after consulting with all parties, fix the date and place of the mediation within the deadlines set by paragraph B below, or the order referring the case to mediation.

B. Deadline for Conducting Mediation. Unless otherwise ordered, the mediation shall be held within 60 days after the Initial Case Management Conference or issuance of the Initial Case Management Order, whichever occurs first.

3.5 REQUEST TO EXTEND THE DEADLINE

A. Motion Required. Requests for extension of the deadline for conducting a mediation shall be made no later than 15 days before the session is to be held and shall be directed to the assigned Judicial Officer, in a motion under LR 7.1, with a copy to the other parties and the mediator.

B. Content of Motion. Such motion shall:

1. Detail the considerations that support the request;

2. Indicate whether the other parties concur in or object to the request; and

3. Be accompanied by a proposed order setting forth a new deadline by

which the mediation shall be held.

3.6 TELEPHONE CONFERENCE BEFORE MEDIATION

The mediator may schedule a brief joint telephone conference with counsel and any unrepresented parties before the mediation session to discuss matters such as the scheduling of the mediation, the procedures to be followed, the nature of the case, and which client representatives will attend.

3.7 NO WRITTEN MEDIATION STATEMENTS

Written mediation statements are not required for mediations.

3.8 ATTENDANCE AT SESSION

A. Parties. All named parties and their counsel are required to attend the mediation unless excused under paragraph D below. This requirement reflects the Court's view that the principal values of mediation include affording litigants opportunities to articulate directly to the other parties and a neutral their positions and interests and to hear, first hand, their opponent's version of the matters in dispute. Mediation also enables parties to search directly with their opponents for mutually agreeable solutions.

1. Corporation or Other Entity. A party other than a natural person (*e.g.*, a corporation or an association) satisfies this attendance requirement if represented by a decision maker(s) (other than outside counsel) who has full settlement authority and is knowledgeable about the facts of the case.

2. Government Entity. A unit or agency of government satisfies this attendance requirement if represented by a person who has, to the greatest extent feasible, full settlement authority, and is knowledgeable about the facts of the case, the governmental unit's position, and the procedures and policies under which the governmental unit decides whether to accept proposed settlements. If the action is brought by the government on behalf of one or more individuals, at least one such individual also shall attend.

3. Any party who fails to have physically in attendance the necessary decision maker(s) will be subject to sanctions.

B. Counsel. Each represented party shall be accompanied at the mediation by the lawyer who will be primarily responsible for handling the trial of the matter. If a party is proceeding *pro se*, a request may be made to the Court to name a *pro bono* attorney to represent the *pro se* litigant at the mediation.

C. Insurers. Insurer representatives are required to attend in person unless excused under paragraph D below, if their agreement would be necessary to achieve a settlement.

D. Request to be Excused. A person who is required to attend a mediation may be excused from attending in person only after a showing that personal attendance would impose an extraordinary or otherwise unjustifiable hardship. A person seeking to be excused must file a motion with the assigned Judicial Officer, no fewer than 15 days before the date set for the session, simultaneously copying all counsel and the mediator. The motion shall:

1. Set forth all considerations that support the request;

2. State realistically the amount in controversy in the case;

3. Indicate whether the other party or parties join in or object to the request, and

4. Be accompanied by a proposed order.

E. Participation by Telephone. A person excused from appearing in person at a mediation shall be available to participate by telephone.

3.9 PROCEDURE AT MEDIATION

A. Procedure. The mediation shall be informal and will employ a facilitative method. Mediators shall have discretion to structure the mediation so as to maximize the benefits of the process.

B. Separate Caucuses. The mediator may hold separate, private caucuses with each side or each lawyer or, if the parties agree, with the parties only. The mediator may not disclose communications made during such a caucus to another party or counsel without the consent of the party who made the communication.

3.10 MEDIATION REPORT

At the conclusion of the mediation, the mediator shall electronically file a written report with the Clerk of Courts which includes the caption and case number, the date of the mediation, whether any follow up is scheduled, whether the case settled in whole or in part, and any stipulations the parties agree may be disclosed.

4. EARLY NEUTRAL EVALUATION

4.1 DESCRIPTION

In Early Neutral Evaluation (ENE) the parties and their counsel, in a confidential session, make compact presentations of their claims and defenses, including key evidence as developed at that juncture, and receive a non-binding evaluation by an experienced neutral lawyer, selected by the parties, with subject matter expertise. The evaluator also helps identify areas of agreement, offers case-planning suggestions and, if requested by the parties, settlement assistance.

4.2 ELIGIBLE CASES

Subject to the availability of an evaluator with subject matter expertise, appropriate civil cases may be referred to ENE by order of the assigned Judge following a stipulation by all parties, on motion by a party under L.R. 7.1, or on the Judge's initiative.

4.3 EVALUATORS

A. Appointment. After entry of an order referring a case to ENE, the parties choose from the Court's panel an evaluator who has expertise in the subject matter of the lawsuit, is available during the appropriate period and has no apparent conflict of interest.

B. Compensation. Unless otherwise agreed by all parties or ordered by the Court, one-half the cost of the evaluator's services shall be borne by the plaintiff(s) and one-half by the defendant(s) at the rate contained in the evaluator's fee schedule filed with the Court. In a case with third-party defendants, the cost shall be divided into three equal shares. An evaluator shall not charge or accept in connection with a particular case a fee or thing of value from any source other than the parties. The Court may review the reasonableness of the fee and enter any order modifying the fee.

Compensation shall be paid directly to the evaluator upon the conclusion of the ADR process, or as otherwise agreed to by the parties and the evaluator. Failure to pay the evaluator shall be brought to the Court's attention.

C. Fee Waiver. A party who demonstrates a financial inability to pay all or part of that party's *pro rata* share of the neutral's fee may request the Court to appoint an evaluator who has agreed to serve *pro bono*. The Court may waive all or part of that party's share of the fee. Other parties to the case who are able to pay the fee shall bear their *pro rata* portions of the fee.

4.4 TIMING AND SCHEDULING THE EARLY NEUTRAL EVALUATION

A. Scheduling by Evaluator. Promptly after being appointed to a case, the evaluator shall, after consulting with all parties, fix the date and place of the ENE within the deadlines set by paragraph B below, or the order referring the case.

B. Deadline for Conducting Session. Unless otherwise ordered, the ENE shall

be held within 60 days after the Initial Case Management Conference or the issuance of the Initial Case Management Order, whichever occurs first.

4.5 REQUESTS TO EXTEND DEADLINE

A. Motion Required. Requests for extension of the deadline for conducting an ENE shall be made no later than 15 days before the ENE is to be held and shall be directed to the assigned Judicial Officer, in a motion under Civil LR 7.1, with a copy to the other parties and the evaluator.

B. **Content of Motion.** Such motion shall:

1. Detail the considerations that support the request;

2. Indicate whether the other parties concur in or object to the request; and

3. Be accompanied by a proposed order setting forth a new deadline by which the ENE shall be held.

4.6 *EX PARTE* CONTACT PROHIBITED

Except with respect to scheduling matters, there shall be no *ex parte* communications between parties or counsel and the evaluator, including private caucuses to discuss settlement, until after the evaluator has either delivered orally his or her evaluation or, if so requested by the parties, has committed his or her evaluation to writing and all parties have agreed that *ex parte* communications with the evaluator may occur.

4.7 TELEPHONE CONFERENCE BEFORE EARLY NEUTRAL EVALUATION

The evaluator shall schedule a brief joint telephone conference with counsel before the ENE to discuss matters such as the scheduling, the procedures to be followed, the nature of the case, and which client representatives will attend.

4.8 WRITTEN STATEMENTS

A. Time for Submission. No later than 10 calendar days before the ENE, each party shall submit directly to the evaluator, and shall serve on all other parties, a written Statement.

B. Prohibition Against Filing. The statements constitute confidential information, shall not be filed and the assigned Judicial Officer shall not have access to them.

C. Content of Statement. The statements shall be concise, may include any information that may be useful to the evaluator, and shall:

1. Identify, by name and title or status:

a. The person(s) with decision-making authority, who, in addition to counsel, will attend the ENE as representative(s) of the party, and

b. Persons connected with a party opponent (including an insurer representative) whose presence might substantially improve the utility of the ENE or the prospects for settlement;

2. Describe briefly the substance of the suit, addressing the party's views of the key liability issues and damages and discussing the key evidence;

3. Address whether there are legal or factual issues whose early resolution would reduce significantly the scope of the dispute or contribute to settlement negotiations;

4. Identify the discovery that is necessary to equip the parties for meaningful settlement negotiations;

5. Describe the history and status of any settlement negotiations; and

6. Include copies of documents out of which the suit arose (*e.g.*, contracts), or whose availability would materially advance the purposes of the evaluation session, *(e.g.*, medical reports or documents by which special damages might be determined).

4.9 SPECIAL PROVISIONS FOR PATENT, COPYRIGHT, OR TRADEMARK CASES

A. Patent Cases. When a claim in a case alleges infringement of a utility patent, or when a party seeks a declaratory judgment that a utility patent is not infringed, is invalid, or is unenforceable, each party must attach to its written Statement a copy of each document the party has been required to generate (by the date the written Statements are due) under Local Patent Rule **3.1, 3.3, and/or 3.4 (a)**, or under any case-specific order modifying the requirements of these provisions of the Local Patent Rules. A party whose duty has arisen only under Local Patent Rule **[3.5A]** may satisfy the requirements hereby imposed by attaching to its written Statement a copy of the documents it was required to generate under Local Patent Rule **3.3**.

B. Copyright Cases. A party who bases a claim on copyright shall include as exhibits the copyright registration and exemplars of both the copyrighted work and the allegedly infringing work, and shall make a systematic comparison showing points of similarity. Such party shall also present whatever direct or indirect evidence it has of copying, and shall indicate whether it intends to elect statutory or actual damages. Each party in a copyright case who is accused of infringing shall set forth in its written statement the dollar volume of sales of and profits from the allegedly infringing works that it and any entities for which it is legally responsible have made.

C. Trademark Cases. A party who bases a claim on trademark or trade dress infringement, or on other unfair competition, shall include as an exhibit its registration, if any, exemplars of both its use of its mark and use of the allegedly infringing mark, both including a description or representation of the goods or services on or in connection with which the marks are used, and any evidence it has of actual confusion. If "secondary meaning" is in issue, such a party shall also describe the nature and extent of the advertising it has done with its mark and the volume of goods it has sold under its mark. Both parties shall describe in their evaluation statements how the consuming public is exposed to their respective marks and goods or services, including, if available, photographic or other demonstrative evidence. Each party in a trademark or unfair competition case who is accused of infringement shall set forth the dollar volume of sales of and profits from goods or services bearing the allegedly infringing mark.

4.10 ATTENDANCE AT SESSION

A. Parties. All named parties and their counsel are required to attend the ENE unless excused under paragraph D below. This requirement reflects the Court's view that the principal values of ENE include affording litigants opportunities to articulate directly to other parties and a neutral their positions and interests and to hear, first hand, both their opponent's version of the matters in dispute and a neutral assessment of the merits of the case and the relative strengths of each party's legal positions.

1. Corporation or Other Entity. A party other than a natural person (*e.g.*, a corporation or an association) satisfies this attendance requirement if represented by a decision maker(s) (other than outside counsel) who has full settlement authority and is knowledgeable about the facts of the case.

2. Government Entity. A unit or agency of government satisfies this attendance requirement if represented by a person who has, to the greatest extent feasible, full settlement authority, and who is knowledgeable about the facts of the case, the governmental unit's position, and the procedures and policies under which the governmental unit decides whether to accept proposed settlements. If the action is brought by the government on behalf of one or more individuals, at least one such individual also shall attend.

3. Any party who fails to have physically in attendance the necessary decision maker(s) will be subject to sanctions.

B. Counsel. Each represented party shall be accompanied at the ENE by the lawyer who will be primarily responsible for handling the trial of the matter. If a party is proceeding *pro se*, a request may be made to the Court to name a *pro bono* attorney to represent the *pro se* litigant at the ENE.

C. Insurers. Insurer representatives are required to attend in person unless excused under paragraph D below, if their agreement would be necessary to achieve a settlement.

D. Request to be Excused. A person who is required to attend an ENE may be excused from attending in person only after a showing that personal attendance would impose an extraordinary or otherwise unjustifiable hardship. A person seeking to be excused must file a motion with the assigned Judicial Officer, no fewer than 15 days before the date set for the session, simultaneously copying all counsel and the evaluator. The motion shall:

1. Set forth all considerations that support the request;

2. State realistically the amount in controversy in the case;

3. Indicate whether the other party or parties join in or object to the request, and

4. Be accompanied by a proposed order.

E. Participation by Telephone. A person excused from appearing in person at an ENE shall be available to participate by telephone.

4.11 **PROCEDURE AT AN** EARLY NEUTRAL EVALUATION

A. Components of Early Neutral Evaluation

The evaluator shall:

1. Permit each party (through counsel or otherwise), orally and through documents or other media, to present its claims or defenses and to describe the principal evidence on which they are based;

2. Help the parties identify areas of agreement and, where feasible, enter stipulations;

3. Assess the relative strengths and weaknesses of the parties' contentions and evidence, and explain carefully the reasoning that supports these assessments;

4. Estimate, where feasible, the likelihood of liability and the dollar range of damages;

5. Help the parties devise a plan for sharing the important information and/or conducting the key discovery that will equip them as expeditiously as possible to enter meaningful settlement discussions or to position the case for disposition by other means;

6. Help the parties assess litigation costs realistically; and

7. If the parties are interested, help them, through private caucusing or otherwise, explore the possibility of settling the case; and

8. Determine whether some form of follow up to the session would contribute to the case development process or to settlement.

B. Process Rules. The session shall be informal. Rules of evidence shall not apply. There shall be no formal examination or cross-examination of witnesses and no recording of the presentations or discussion shall be made.

C. Evaluation. The evaluation shall be presented orally on demand by any party, and may be supplemented by a written evaluation within ten days of the ENE if so requested by the parties.

D. Settlement Discussions. At any point during the ENE, if all parties agree, they may proceed to discuss settlement.

4.12 LIMITATION ON AUTHORITY OF EVALUATOR.

Evaluators have no authority to compel parties to conduct or respond to discovery or to file motions. Nor do evaluators have authority to determine what the issues in any case are, to impose limits on parties' pretrial activities, or to impose sanctions.

4.13 EARLY NEUTRAL EVALUATION REPORT

At the conclusion of the ENE, the evaluator shall electronically file a written report with the Clerk of Courts which includes the caption and case number, the date of the session, whether any follow up is scheduled, whether the case settled in whole or in part, and any stipulations the parties agree may be disclosed.

5. ARBITRATION

5.1 Description

Arbitration is an adjudicative process in which an arbitrator or a panel of three arbitrators, selected by the parties, issues a non-binding judgment ("award") on the merits after an expedited, adversarial hearing. Either party may reject the non-binding award and request a trial *de novo*. An arbitration occurs earlier in the life of a case than a trial and is less formal and less expensive. Because testimony is taken under oath and is subject to cross-examination, arbitration can be especially useful in cases that turn on credibility of witnesses. Arbitrators do not facilitate settlement discussions.

5.2 **REFERRAL BY AGREEMENT**

A case may be referred to arbitration by order of the assigned Judicial Officer only upon the written consent of all parties. Consent must be given freely and knowingly and no party or attorney in any such case may be prejudiced for refusing to consent to participate in arbitration, in accordance with 28 U.S.C. §654.

5.3 **ARBITRATORS**

A. Selection. After entry of an order referring the case to arbitration, the parties shall choose an arbitrator from the Court's panel or, if the parties cannot decide, an arbitrator shall be randomly selected by the Clerk. The parties have the option of choosing a panel of three arbitrators. If the parties cannot agree upon the panel of three, one or more arbitrators may be selected by the Clerk.

B. Notification by Clerk. The Clerk shall promptly notify the person or persons who is selected to serve. If any person so selected is unable or unwilling to serve, the Clerk will secure another arbitrator after conferring with the parties. When the requisite number of arbitrators has agreed to serve, the Clerk shall promptly send written notice of the selections to the arbitrator(s) and to the parties. When a panel of three arbitrators is selected, the Clerk shall designate the person to serve as the panel's presiding arbitrator.

C. Compensation. Arbitrators shall be paid by the Court $250 per day or portion of each day of hearing in which they serve as a single arbitrator or $100 for each day or portion of each day in which they serve as a member of a panel of three. No party may offer or give the arbitrator(s) any gift.

D. Payment and Reimbursement. When filing an award, arbitrators shall submit a voucher on the form prescribed by the Clerk for payment of compensation and for reimbursement of any reasonable transportation expenses necessarily incurred in the performance of duties. No reimbursement will be made for any other expenses.

5.4 **TIMING AND SCHEDULING THE HEARING**

A. Scheduling by Arbitrator. Promptly after being appointed to a case, the arbitrator(s) shall arrange for the pre-session phone conference and, after consulting with all parties, shall fix the date and place for the arbitration within the deadline fixed by the assigned Judicial Officer, or if no such deadline is fixed, within 90 days after the notice of appointment. Counsel and unrepresented parties shall respond promptly to and cooperate fully with the arbitrator(s) with respect to scheduling the pre-session phone conference and the arbitration hearing. The hearing date shall not be continued or vacated except for emergencies as established in writing and approved by the assigned Judicial Officer. If the case is resolved before the hearing date, or if due to an emergency a participant cannot attend the arbitration, counsel or

an unrepresented party shall notify the arbitrator(s) immediately upon learning of such settlement or emergency.

B. Place and Time. The hearing may be held at any location within the Western District of Pennsylvania selected by the arbitrator(s), including a room at a federal courthouse, if available. In selecting the location, the arbitrator(s) shall consider the convenience of the parties and witnesses. Unless the parties agree otherwise, the hearing shall be held during normal business hours.

5.5 *EX PARTE* CONTACT PROHIBITED

Except with respect to scheduling matters, there shall be no *ex parte* communications between parties or counsel and an arbitrator.

5.6 WRITTEN ARBITRATION STATEMENTS

A. Time for Submission. No later than 10 calendar days before the arbitration session, each party shall submit directly to the arbitrator(s), and shall serve on all other parties, a written Arbitration Statement.

B. Prohibition against Filing. The statements shall not be filed and the assigned Judicial Officer shall not have access to them.

C. Content of Statement. The statements shall be concise and shall:

1. Summarize the claims and defenses;

2. Identify the significant contested factual and legal issues, citing authority on the questions of law;

3. Identify proposed witnesses; and

4. Identify, by name and title or status, the person(s) with decision-making authority, who, in addition to counsel, will attend the arbitration as representative(s) of the party.

D. Modification of Requirement by Arbitrator(s). After jointly consulting counsel for all parties and any unrepresented parties, the arbitrator(s) may modify or dispense with the requirements for the written Arbitration Statements.

5.7 TELEPHONE CONFERENCE BEFORE ARBITRATION

The arbitrator(s) shall schedule a brief joint telephone conference with counsel and

any unrepresented parties before the arbitration to discuss matters such as the scheduling of the arbitration, the procedures to be followed, whether supplemental written material should be submitted, which witnesses will attend, how testimony will be presented, including expert testimony, and whether and how the arbitration will be recorded.

5.8 ATTENDANCE AT ARBITRATION

A. Parties. Each party shall attend the arbitration hearing unless excused under paragraph D below. This requirement reflects the Court's view that principal values of arbitration include affording litigants an opportunity to articulate their positions and to hear, first hand, both their opponent's version of the matters in dispute and a neutral assessment of the merits of the case.

1. Corporation or Other Entity. A party other than a natural person (*e.g.*, a corporation or an association) satisfies this attendance requirement if represented by a decision maker(s) (other than outside counsel) who has full settlement authority and who is knowledgeable about the facts of the case.

2. Government Entity. A unit or agency of government satisfies this attendance requirement if represented by a person who has, to the greatest extent feasible, full settlement authority, and who is knowledgeable about the facts of the case, the governmental unit's position, and the procedures and policies under which the governmental unit decides whether to accept proposed settlements. If the action is brought by the government on behalf of one or more individuals, at least one such individual also shall attend.

3. Any party who fails to have physically in attendance the necessary decision maker(s) will be subject to sanctions.

B. Counsel. Each represented party shall be accompanied at the arbitration session by the lawyer who will be primarily responsible for handling the trial of the matter. If a party is proceeding *pro se*, a request may be made to the Court to name a *pro bono* attorney to represent the *pro se* litigant at the arbitration.

C. Insurers. Insurer representatives are required to attend in person unless excused under paragraph D below, if their agreement would be necessary to achieve a settlement.

D. Request to be Excused. A person who is required to attend an arbitration hearing may be excused from attending in person only after a showing that personal

attendance would impose an extraordinary or otherwise unjustifiable hardship. A person seeking to be excused must file a motion with the assigned Judicial Officer, no fewer than 15 days before the date set for the session, simultaneously copying the Arbitration Clerk, all other counsel and unrepresented parties and the arbitrator(s). The motion shall seeking to be excused must:

1. Set forth with specificity all considerations that support the request;

2. State realistically the amount in controversy in the case;

3. Indicate whether the other party or parties join in or object to the request; and

4. Be accompanied by a proposed order.

E. Participation by Telephone. A person excused from attending an arbitration in person shall be available to participate by telephone.

5.9 AUTHORITY OF ARBITRATORS AND PROCEDURES AT ARBITRATION

A. Authority of Arbitrators. Arbitrators shall be authorized to:

1. Administer oaths and affirmations;

2. Make reasonable rulings as are necessary for the fair and efficient conduct of the hearing; and

3. Make awards.

B. Prohibition on Facilitating Settlement Discussions. Arbitrators are not authorized to facilitate settlement discussions. If the parties desire assistance with settlement, the parties or arbitrator(s) may request that the case be referred to mediation (see Section 3 above), or a settlement conference before the Court.

C. Presumption against Bifurcation. Except in extraordinary circumstances, the arbitrator(s) shall not bifurcate the arbitration.

D. Quorum. Where a panel of three arbitrators has been named, any two members of a panel shall constitute a quorum, but the concurrence of a majority of the entire panel shall be required for any action or decision by the panel, unless the parties stipulate otherwise.

E. Testimony.

1. Subpoenas. Attendance of witnesses and production of documents may be compelled in accordance with F.R.Civ.P. 45.

2. Oath and Cross-examination. All testimony shall be taken under oath or affirmation and shall be subject to such reasonable cross-examination as the circumstances warrant.

3. Evidence. In receiving evidence, the arbitrator(s) shall be guided by the Federal Rules of Evidence, but shall not thereby be precluded from receiving evidence which the arbitrator(s) consider(s) relevant and trustworthy and which is not privileged.

F. Transcript or Recording. A party may cause a transcript or recording of the proceedings to be made but shall provide a copy to any other party who requests it and who agrees to pay the reasonable costs of having a copy made.

G. Default of Party. The unexcused absence of a party shall not be a ground for continuance, but damages shall be awarded against an absent party only upon presentation of proof thereof satisfactory to the arbitrator(s).

5.10 AWARD AND JUDGMENT

A. Form of Award. An award shall be made after an arbitration under this Rule. Such an award shall state clearly and concisely the name or names of the prevailing party or parties and the party or parties against which it is rendered, and the precise amount of money, if any, awarded. It shall be in writing and (unless the parties stipulate otherwise) be signed by the arbitrator or by at least two members of a panel. No arbitrator shall participate in the award without having attended the hearing. Costs within the meaning of F.R.Civ.P. 54 and Civil LR 54.1 may be assessed by the arbitrator(s) as part of an arbitration award.

B. Filing and Serving the Award. Within 10 days after the arbitration hearing is concluded, the arbitrator(s) shall deliver the award to the Arbitration Clerk in an unsealed envelope with a cover sheet stating: "Arbitration Award." The cover sheet also shall list the case caption, case number and name(s) of the arbitrator, but shall not specify the content of the award. The Clerk shall note the entry of the arbitration award on the docket and promptly serve copies of the arbitration award on the parties.

C. Sealing of Award. Each filed arbitration award shall promptly be sealed by the Clerk. The award shall not be disclosed to any Judicial Officer who might be assigned to the case until the Court has entered final judgment in the action or the action has been otherwise terminated, except as necessary to assess costs or prepare the report required by Section 903(b) of the Judicial Improvements and Access to Justice Act.

D. Entry of Judgment on Award. If no party has filed a demand for trial *de novo* (or a notice of appeal, which shall be treated as a demand for trial *de novo*) the Clerk shall enter judgment on the arbitration award in accordance with F.R.Civ.P. 58. A judgment so entered shall be subject to the same provisions of law and shall have the

same force and effect as a judgment of the Court in a civil action, except that the judgment shall not be subject to review in any other court by appeal or otherwise.

5.11 **TRIAL *DE NOVO***

A. Time for Demand. If any party files and serves a demand for trial *de novo* within 14 days of entry of the filing of the arbitration award, no judgment thereon shall be entered by the Clerk and the action shall proceed in the normal manner before the assigned Judicial Officer. Failure to file and serve a demand for trial *de novo* within this 14-day period waives the right to trial *de novo*.

B. Limitation on Admission of Evidence. At the trial *de novo* the Court shall not admit any evidence indicating that there has been an arbitration proceeding, the nature or amount of any award, or any other matter concerning the conduct of the arbitration proceeding, unless:

1. The evidence would otherwise be admissible in the trial under the Federal Rules of Evidence, or

2. The parties have otherwise stipulated.

C. Award Not to be Attached. A party filing a demand for a trial *de novo* shall not attach the arbitration award.

5.12 **STIPULATION TO BINDING ARBITRATION**

At any time before the arbitration hearing, the parties may stipulate in writing to waive their rights to request a trial *de novo*. Such stipulation shall be submitted to the assigned Judicial Officer for approval and shall be filed. In the event of such stipulation, judgment shall be entered on the arbitration award.

5.13 **FEDERAL ARBITRATION ACT**

Nothing in these ADR Policies and Procedures Rules limits any party's right to agree to arbitrate any dispute, regardless of the amount, pursuant to Title 9, United States Code, or any other provision of law.

6. CONFIDENTIALITY

A presumption of confidentiality shall apply to all ADR processes. All communications associated with or taking place at an ADR session will be treated as confidential information. Confidential information shall not be disclosed to anyone not involved in the litigation, disclosed to the assigned Judicial Officer or used for any purpose, including impeachment, in any pending or future proceeding.

Comment

Ordinarily, anything that happened or was said in connection with a mediation is confidential. *See, e.g.,* Fed. R. Evid. 408; Pa. R. E. 408; 42 Pa. C. S. §§ 5949 & 6141. The law may provide some limited circumstances in which the need for disclosure outweighs the importance of protecting the confidentiality of a mediation. *E.g.,* threats of bodily injury (*see* Pa. C. S. § 5949(b)(2)(I)); threats to damage real or personal property under circumstances constituting a felony (*see id.* § 5949(b)(2)(ii)); conduct during mediation session causing direct bodily injury (*see id* § 5949(b)(2)(iii)). Accordingly, after application of legal tests which are appropriately sensitive to the policies supporting the confidentiality of mediation proceedings, the Court may consider whether the interest in mediation confidentiality outweighs the asserted need for disclosure.

7. OTHER ADR PROCESSES

7.1 Private ADR

There are numerous private sector providers of ADR services including arbitration, mediation, fact-finding, neutral evaluation and private judging. Private providers may be lawyers, law professors, retired judges or other professionals with expertise in dispute resolution techniques. Virtually all private sector providers charge fees for their services. The Court is willing to refer cases to private providers with the stipulation of the parties. The assigned Judicial Officer will take appropriate steps to assure that a referral to private ADR does not result in an imposition on any party of an unfair or unreasonable economic burden.

7.2 **Special Masters.**

The Court may appoint special masters to serve a wide variety of functions, including, but not limited to: discovery manager, fact finder or host of settlement negotiations. Generally the parties pay the master's fees.

7.3 Non-binding Summary Bench or Jury Trial.

A summary bench or jury trial is a flexible, non-binding process designed to promote settlement in complex, trial-ready cases headed for protracted trials. The process provides litigants and their counsel with an advisory verdict after a short hearing in which the evidence may be presented in condensed form, usually by counsel and sometimes through witnesses. This procedure, as ordinarily structured, provides the litigants an opportunity to ask questions and hear the reactions of the Judicial Officer or jury. The Judicial Officer's or jury's non-binding verdict and reactions to the legal and factual arguments are used as bases for subsequent settlement negotiations. Parties considering a non-binding summary trial are encouraged to contact the ADR Coordinator for assistance in structuring a summary trial tailored to their case.